

WEBINAR WEDNESDAYS



Wednesday, April 7, 2021

Addressing Sexual & Domestic Violence: Forfeiture by Wrongdoing

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Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
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Webinar Wednesday

The Confrontation Clause Re-visited: Forfeiture by Wrongdoing


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Chutzpah [(khoot-spuh, hoot-spuh)] *Noun; from Yiddish*



Yiddish term for courage bordering on arrogance, roughly equivalent to "nerve" (in the [slang](#) sense): "It took a lot of chutzpah to make such a controversial statement."

The New Dictionary Of Cultural Literacy, Third Edition
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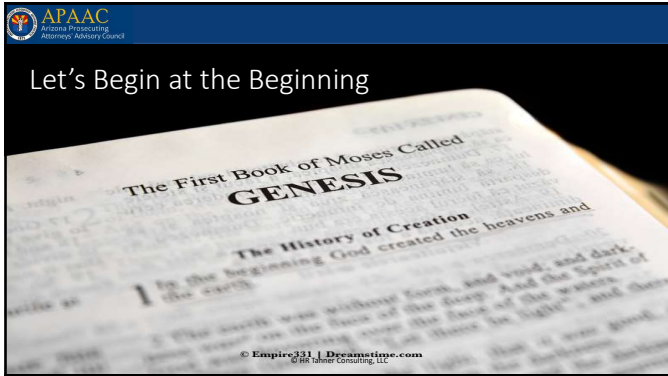
Chutzpah [(khoot-spuh, hoot-spuh)] *Noun; from Yiddish*

When a man murders his parents and pleads for mercy from the court because he's an orphan.



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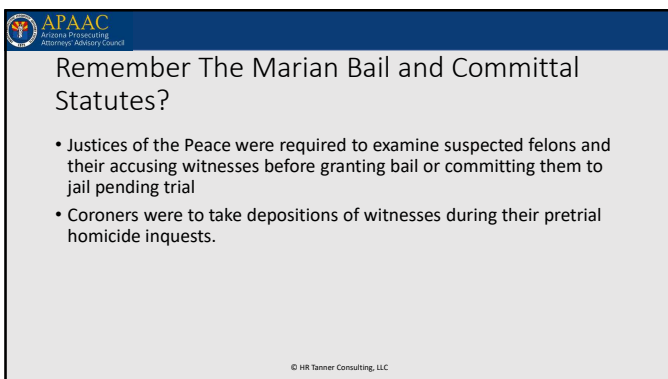
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Forward to 1666 – Lord Morley's Case

- Morley was on trial before the House of Lords for killing a man after a quarrel
- 12 Judges were tasked to advise the House on the admissibility of depositions taken by the coroner
- The Judges advised that the depositions were admissible IF
 - The witness was "dead or unable to travel," or
 - "Detained by the means or procurement of the prisoner."

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Equitable Forfeiture

One who wrongfully makes a witness unavailable should not profit from his wrongful conduct

PLAY NICE

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"The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts....[I]f a defendant voluntarily keeps the witnesses away, he cannot insist on his [Sixth Amendment] privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated."

Reynolds v. United States, 98 US 145 (1878)

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United States v. Mastrangelo

693 F.2d 269 (2d Cir. 1982)

- Mastrangelo was charged with several drug offenses
- The only witness to connect him to the offenses was Bennet, who testified to the grand jury that he sold the trucks in which the drugs were found to Mastrangelo under dodgy circumstances
- He also identified Mastrangelo's voice on recording threatening him if he testified and put him in the frame at the grand jury
- Bennet was shot and killed as he left his house to testify at trial
- Objected on Confrontation grounds to reading Bennet's testimony

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United States v. Mastrangelo

693 F.2d 269 (2d Cir. 1982)


- Now that's Chutzpah!
- BTW, the Judge who wrote the opinion became the Chairman of the Advisory Committee on Evidence Rule 1994
- Rule of Evidence 804(b)(6) was recommended by that Judge

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New Wine in an Old Bottle

- Equitable forfeiture remained the sole procedure until 1997 when the new rule was adopted
- Intended as a prophylactic rule to deal with abhorrent behavior which strikes at the heart of the system of justice itself



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Forfeiture by Wrongdoing – FRE 804(b)(6)

THE EXCEPTIONS. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused-or acquiesced in wrongfully causing-the declarant's unavailability as a witness, and did so intending that result.

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Intentionally broad

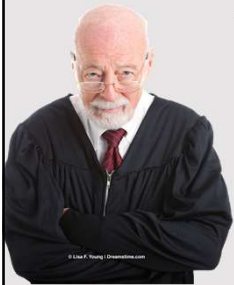
- “Wrongdoing” and acquiescence” are intentionally broad and meant to avoid over inclusion and under inclusion
- No question that the new rule was directed at witness tampering, represented in its most extreme form by the murder of witness
- But what conduct, short of murder, is sufficient wrongdoing

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What are the Issues?



- Witness must be unavailable (but the definitions in 804(a) don't apply)
- How wrong does the conduct have to be
- How does one “acquiesce,” is knowledge enough
- What about mixed or multiple intents

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When is a Witness Unavailable

- A witness who is murdered (if the conduct can be attributed to the defendant)
- A witness who is subpoenaed but doesn't appear
 - Proper service
 - Reasonable, but not heroic, efforts to locate the witness


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When is a Witness Unavailable

- A witness who refuses to testify after being ordered to do so, or who persists to invoke 5th Amendment privilege after it is lawfully extinguished - immunity, conviction




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What About A Witness Who Is Feigning Loss of Memory?



- The witness is *physically* present for cross-examination
- Does it matter that the loss of memory is genuine or feigned?
- Is this an 801 or an 804 problem
- A claim not to remember the substance of prior statement at trial is inconsistent with the prior statement, Ariz. R. Evi. 801(d)(1)(A)
- 804(b)(1) exception for prior testimony

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How Wrong is Wrong Enough

Need not be criminal. "Rather, it contemplates application against the use of coercion, undue influence, or pressure to silence testimony and impede the truth-finding function of trials."

U.S. v. Scott, 284 F3d 758 (7th Cir. 2002)

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Please Don't Testify

Defendant is on trial for Murder. The defendant's 15-year-old half-brother, Medina, admitted in a videotaped interview that he and defendant raped and murdered the victim. Medina was found guilty in juvenile court. After that, he steadfastly refused to testify in the defendant's trial, wrongly invoking the 5th Amendment. While in jail Medina begins to wobble on his refusal to testify. The defendant writes to the witness and tells him to "hang in there" and be sure not to say "anything important over the f*****phones." Medina continues to refuse to testify.

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State v. Hallum

It is naive to think that the defendant was not encouraging his brother to persist in his refusal to testify when the defendant told Medina to "hang in there" and, in the same paragraph, reassures him that the judge would not let the tape of Medina's statement into evidence, "[s]o calm down." We also agree with the trial court's assessment that Medina's later letter to his brother showed that Medina was influenced by the defendant and was concerned about how the defendant would feel about Medina if Medina broke down and testified.

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How Bad does the Wrongdoing have to be?

Meant to apply to a wide range of conduct.


- "Any significant interference" including "influence and control." *Steele v. Taylor*, 684 F.2d 1193 (6th Cir. 1982).
- "Knowledge, complicity, planning or in any other way." *People v. Pappalardo*, 152 Misc 2d 364 (N.Y. 1991)

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You Have the Right to Remain Silent, but not the Capacity

- No Victim, No Case
- Defendant places 109 calls to the Victim in one month, speaking to her 58 times
- Victim asked her advocate what would happen if she did not testify
- Victim fails to appear though subpoenaed



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You Have the Right to Remain Silent, but not the Capacity

Defendant: uh, basically man, if— if— if the person don't show up, man, they're gonna have to let me go— they'll have to drop the charges.

Victim: Yeah, and that person gets in trouble.

Defendant: No they don't. Trust me. I talked to my lawyer, right, and my lawyer said this. My lawyer said— my lawyer said all— my lawyer said all she got to do is call the— to the prosecutor's office and tell the prosecutors that she wants to drop charges, and they'll drop them.

...

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You Have the Right to Remain Silent, but not the Capacity

State v. Franklin, 232 Ariz. 556, 307 P.3d 983 (Ariz.App. Div. 1 2013)

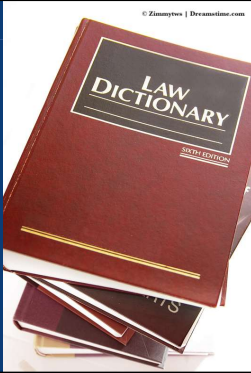
- Defendant argues that the wrongdoing must be in the form of some type of threat, request or directive. We find no such limits in the law— any form of witness tampering can constitute a "wrongdoing" for purposes of invoking the forfeiture exception under Rule 804(b)(6).
- these statements amounted to influential and controlling conduct designed to persuade Victim not to appear at trial to testify against Defendant.

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Acquiesce means "[t]o accept tacitly or passively." Black's Law Dictionary 26 (9th ed.2009)



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Pinkerton Conspiratorial Liability

- a person is liable for substantive offenses committed by a co-conspirator when their commission is reasonably foreseeable and in furtherance of the conspiracy
- encompasses a person who, while not directly committing an offense, has participated in a conspiracy that leads a confederate to engage in that conduct

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Organized Gang

Family DV Dynamics



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United States v. Montague, 421 F.3d 1099 (CA 10, 2005)

Defendant met with victim 5 times while in jail, plus phone calls discussing changing her story

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Defendant objects to evidence of prior abuse offered at forfeiture hearing

History was relevant to understand relationship

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What About Mixed Intent?

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Making the witness unavailable need not be the *sole* intent; it only has to be an intent of the defendant

U.S. v. Dhinsa, 243 F.3d 635 (2nd Cir. 2001
Also, *State v. Ivy*,
188 S.W.3d 132 (Tenn. 2006),

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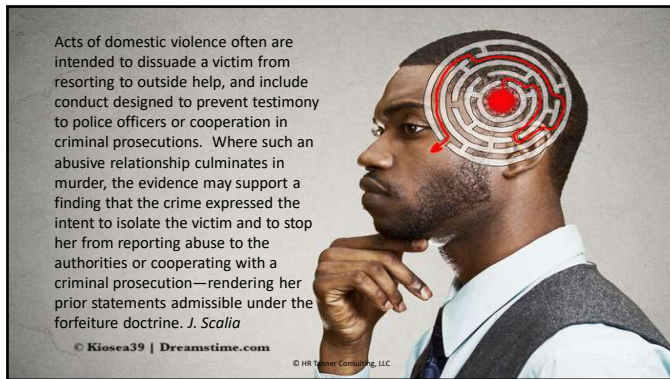
Murder Changes Everything

P.D. James

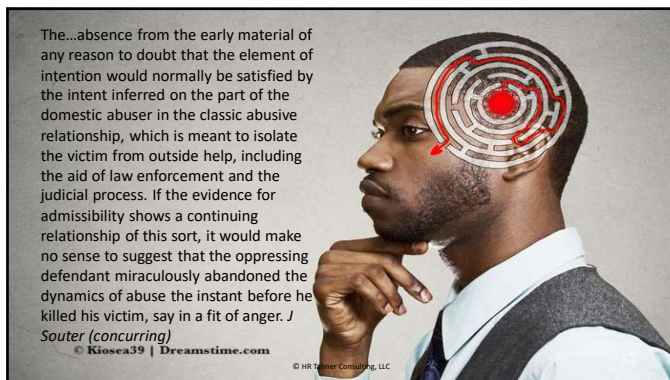
- *Giles v. California* tested forfeiture after *Crawford*
- What constitutes intent to make a witness unavailable in the context of domestic violence murder

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With Great Power Comes Great Responsibility

Uncle Ben

- There is a real danger of overreaching and trying to invoke rule in every case
- Overreach will eventually lead to bad precedent



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Procedural Niceties

- Pre-trial hearing is best- practice

[A] pre-trial hearing may also go “a long way towards solving the problem that much of the evidence of the defendant's wrongdoing is in the hands of the unavailable witness.” Herb Tanner, Jr., *Forfeiture by Wrongdoing in a Post-Giles World*, 42 Prosecutor 34, 40 (2008). (noting that the Federal Rules of Evidence do not apply in a pre-trial hearing on forfeiture, thus enabling the court to consider the unavailable witness's statements in making the threshold evidentiary determination).

United States v. Ledbetter, 141 F.Supp.3d 786 (2015)

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Procedural Niceties

- Pre-trial hearing is best- practice
- Ariz. R. Evi. 104(A) and 1101 – not bound by rules of evidence
- This includes admitting the witness's uncontroverted statements

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What is Evidence


- Past Conduct
- Charged incident
- Post-Incident
 - Jailhouse calls and letters – defendant to victim, defendant to family and friends
 - Contact when on bond – is a violation of bond or PO in itself sufficient wrongdoing?
- Contact with, and conduct of family and friends (sometimes known as co-conspirators)

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Complete the Puzzle




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What Do Get When You Win

All hearsay objections are forfeited, **any statement** of unavailable witness is admissible if offered against the party who made the witness unavailable



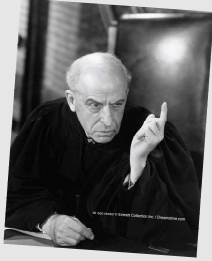
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J'accuse!

- Witness Tampering
- Extortion (?)
- Bond Violations



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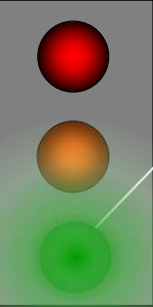
What About Arresting the Victim/Witness Who Defies a Subpoena



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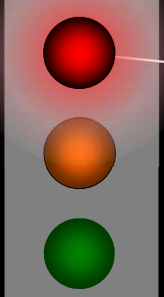
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Why Do It?



- The victim is available for cross
- It makes us feel like we've done something
- The Court demands it


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Why NOT?


- Revictimizes the victim
- Dangerous for victim
- You won't get truthful testimony
- Empowers the batterer
- Ensures this victim, and many others, will never call again
- Endangers Federal funds

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Our First Concern Should be the Victim's Safety


- Not showing up should ring safety alarm bells
- Ask for opportunity to find out if victim is safe
- May not need to invoke the power of the Court



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Remember What We are Asking a Survivor to Do

Publicly, under oath, defy the one person who knows best how to physically and emotionally harm you; the one who has threatened to harm you in the past, and who has made good on those threats; the one from whom the system cannot protect you forever; the one you love

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The Defense is Offense

Protecting the Victim = A Testifying Witness

- Involve community-based advocates early and often
- Safety planning - Is the victim in a place that is stable, supportive and safe?
- Protect the victim's safety with bond conditions, no contact orders
 - Enforcement
 - No agreement to relaxation of conditions
- Courtroom considerations (configuration, security)
- Fight defense attempts to intimidate the victim
- Continue the investigation after arrest

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ESKER	GRAZAS
DÍKI	HVALA
GRAZZI	HATUR NUHUN

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Thank You!


Remember, Domestic Violence prosecutions, especially misdemeanor cases, have all the reasons why you became a prosecutor

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"Empowering prosecutors through training and advocacy to serve as Ministers of Justice, as we strive to build criminal justice bridges with the greater community."




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